tion in the State courts. These points will be discussed fully in the argument.

The petition should also be denied because (1) the decision of the State court is not final, and (2) petitioners are seeking a single writ to review decisions in twenty-three cases.

1. The Decision of the State Court Is Not Final.

Each of the twenty-three judgments of the California Supreme Court in the twenty-three cases seeking a refund of alleged discriminatory taxes provides that the judgment of the trial court in favor of the plaintiff is reversed with directions to the trial court to proceed in accordance with the views expressed in the opinion. (R. 331, 439-441). Such directed proceedings involve the taking of evidence to determine the amount of damage suffered. (R. 330.) Such directed proceedings have not yet been had. Since as to each of the twenty-three cases, "only one branch of the case has been finally disposed of below, therefore none of it is ripe for review by this Court." *Collins v. Miller,* 252 U. S. 364, 371.

A judgment to be final must be the final word of a final court and not be subject to review or correction in any other state tribunal. *Market Street Railway Co. v. Railroad Commission,* 324 U. S. 548, 551; *Laclede Gas Light Co. v. Public Service Com.,* 304 U. S. 398, 399-400; *Davis v. Crouch,* 94 U. S. 514, 517; Urie *v. Thompson,* 337 U. S. 163, 172-173; *Louisiana Nav. Co. v. Oyster Com.,* 226 U. S. 99, 102; *Great Western Tel. v. Burnham,* 162 U. S. 339, 345. Even though the

State Supreme Court has made definite rulings on Federal questions, if the judgment provides for further discretionary action by a lower state tribunal (as here where new values are to be determined based on evidence of value) such a judgment does not meet the test of finality *California National Bank v. Stateler,* 171 U. S. 447, 449; *Sand Springs Home v. Naharkey,* 299 U. S. 588. It is not sufficient that the major issue be determined. It must be a final determination of the controversy, both factually and legally. *Republic Natural Gas Company v. Oklahoma,* 334 U. S. 62, 67-68; *Bruce v. Tobin,* 245 U. S. 18, 19; *Mississippi Central Railroad Company v. Smith,* 295 U. S. 718; *Martinez v. International Banking Corp.,* 220 U. S. 214, 223.

To demonstrate that the proceedings yet to be had in the trial court are not merely ministerial, we shall devote the next three paragraphs to a discussion of the case and what still remains to be done.

The assessments involved are building assessments shown on the tax roll under the heading "Improvements" and opposite the description of the land upon which they are located. (R. 58.) In valuing the various buildings, the Los Angeles County Assessor from 1941 to 1946 valued petitioners' buildings including the enhanced value resulting from the presence of fixtures (R. 90-91), which in California are real property and part of the improvements for the purpose of taxation. Secs., 104 and 105, California Revenue and Taxation Code, derived from former Sec. 3617, California Political Code, enacted 1872; *San Diego Trust & Savings Bank v. San Diego,* 16 Cal. 2d 142, 105 Pac. 2d

94 [1940], certiorari denied 312 U. S. 679; *Trabue Pittman Corp. v. Los Angeles,* 29 Cal. 2d 385, 175 Pac. 2d 512 [1946]. In valuing other buildings the Assessor, during the same years, did not include the value of the fixtures but instead assessed them separately as personal property. (R. 69-70.) Personal property in California is taxed at the same rates and proportion of value as real property but is not subject to special assessment levies. (R. 322.) Thus the buildings of all were properly on the roll, properly described as "improvements", and properly assessed as real property, but because of the difference in such valuation practice such other buildings escaped special assessment levies on the small fixtures value of the property. This is the misclassification found by the State courts and referred to in the petition. This resulted in the following:

Taxes* paid by petitioners	Taxes paid by others
A. On land. (Not in dispute in this litigation.)	
1. County taxes	1. County taxes
2. City taxes	2. City taxes
3. School District taxes	3. School District taxes
4. Special assessments	4. Special assessments
B. On the structure portion of the building.	
5. County taxes	5. County taxes
6. City taxes	6. City taxes
7. School District taxes	7. School District taxes
8. Special assessments	8. Special assessments
C. On the fixture portion of the building.	
9. County taxes	9. County taxes
10. City Taxes	10. City Taxes
11. School District taxes	11. School District taxes
12. Special assessments	

*Pursuant to statutory authorization, in Los Angeles County the taxes and special assessments of the separate entities involved herein are all collected at the same time by County officers.

Thus, the petitioners and the others were subject alike to the first eleven items, but the others escaped the twelfth item. While the amount of the discrimination is comparatively nominal (being only a part of the total rate (R. 128) and applied to only a portion of the building value), the State Supreme Court nevertheless gave full recognition to the State and Federal Constitutions and Federal laws and remanded all twenty-three cases with directions to have the valuation on the twelfth item determined by the County Board of Equalization, and to have the trial court order the refund of such special assessments to petitioners. (R. 330.) Petitioners are not satisfied with such equal treatment, but without waiting for the completion of proceedings in the State courts which will bring it about, seek to have the matter reviewed by this Court in an effort to obtain a refund not only of item 12 but also of items 5 to 11. This result, it will be observed, would go further than to correct the found inequality; it would itself create a new and unconstitutional discrimination against all other taxpayers.

If the State courts are not prevented by this Court from completing the proceedings, all taxpayers will be treated the same with respect to local tax burden and no discrimination in fact will remain. At the conclusion of proceedings in the State court it may be that the petitioners will be satisfied with the amount of the award, or that new and different Federal questions will be presented. The decision, therefore, does not have the finality essential to confer jurisdiction on this

Court. *Republic Natural Gas Co. v. Oklahoma,* 334 U. S. 62 at 68; *Kimball v. Evans,* 93 U. S. 321.

2. Petitioners are Improperly Seeking a Single Writ to Review Twenty-three Separate Cases.

In petitioning for a single writ of certiorari, petitioners overlook what is obvious upon the face of the record—that there are twenty-three separate and distinct cases herein involved.*

"Such proceedings are palpably irregular;" *Brown v. Spofford,* 95 U. S. 474 at 485.

Our objection goes not to the use of a single petition and single record but to application for a single writ to bring before the Court twenty-three cases presenting questions not common to all. There are five bank-plaintiff cases and eighteen landlord-plaintiff cases, each group involving different issues. They were not consolidated as in *First National Bank v. Louisiana Tax Commission,* 289 U. S. 60 at 62, and hence are reviewable, if at all, only by separate proceedings in certiorari. In this brief we state the questions separately and discuss them separately in the argument.

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*The facts demonstrating this to be true are:
(1) There are separate complaints, pleadings, and docket numbers in the trial court (R. 1, 32, 138); (2) they were tried as separate cases (except that in each of the six years the Simms and Gribble cases were consolidated for trial only); (3) a separate judgment was rendered in each case (except for the pairs of Simms and Gribble cases noted above) (R. 114, 220, 232, 234, 238, 241, 243, 246, 248, 251, 253, 256, 257, 260, 262, 264, 267); (4) a separate notice of appeal was filed in each case (R. 117, 138); (5) each case received a separate docket number on appeal (R. 138, 231); (6) a separate clerk's transcript on appeal was filed in each case (R. 138, 231); (7) the State Supreme Court's opinion bears the title and docket number of each separate case, and states that the "judgments" in the cases are reversed, etc. (R. 317, 330, 331); and (8) a separate remittitur was issued in each case (R. 439-441).

QUESTIONS PRESENTED

The questions herein involved, when properly classified as to the respective cases, are:

1. In the five cases in which the bank was plaintiff in the State court and is petitioner here:

> Where petitioner's building including fixtures is properly classified and correctly taxed, do errors in the classification of fixtures in other buildings which do not result in any lesser tax burden, constitute discrimination prohibited by either the Equal Protection Clause or paragraph 3 of R. S. 5219?

2. In the eighteen cases in which the bank was located in a building owned by a nonbank landlord and such landlord was plaintiff in the State court and is petitioner here:

> Where petitioner's building including fixtures is properly classified and correctly taxed, do errors in the classification of fixtures in other buildings which do not result in any lesser tax burden, constitute discrimination prohibited by the Equal Protection Clause?

3. In all twenty-three cases:

> Where the State law permits the taxing entities to reassess and again collect the legally valid portion of taxes refunded by order of court, does it violate the Due Process Clause for the State court to hold in accordance with State practice and prior State decisions that a setoff of such valid portion of the challenged taxes may and shall be

made in the initial refund proceedings and only the invalid portion of the tax be refunded?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved herein are the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; Rev. Stats., sec. 5219 (12 U. S. C. 548); sections 104, 105, 2188, 2188.2 and 5141, California Revenue and Taxation Code; sections 4a, 27 and 30, Bank and Corporation Franchise Tax Act, Calif. Stats. 1929, p. 19, 3 Deering's General Laws, Act 8488.

STATEMENT

Petitioners seek review of decisions of the California Supreme Court which adjudged certain real property taxes to be discriminatory and violative of R. S. 5219 or the Equal Protection Clause, or both, even though such taxes conformed to and were valid under State law. (R. 326.) The decisions sought to be reviewed, moreover, awarded to petitioners full relief from such discrimination by ordering refund to them of the entire found discriminatory portion of their otherwise valid taxes. (R. 330.) The petitioners attempt to reverse judgments which awarded to petitioners the full relief to which they are entitled, and which will thus produce complete equality of tax treatment as between petitioners and all other taxpayers.

The found discrimination involved correct classification and assessment as part of the building ("improvements") or real property during the tax years 1941 through 1946 of vault doors and counterlines installed in buildings used for banking purposes. (R. 326.) Question was raised because comparable trade fixtures in buildings other than those occupied by banks were generally misclassified and assessed as personal property. (R. 318-319.) Petitioners' taxes, taken by themselves, were completely valid and in conformity with R. S. 5219 and the Equal Protection Clause. It was the trade fixtures of such *other* property owners which were misclassified. However, except for special assessments, levied upon real property only, personal property was taxed at the same rate and proportion of value as real property. (R. 322.) Hence, the misclassification of trade fixtures of others merely resulted in such other taxpayers escaping part of their special assessments. The special assessment rate was but a fraction of the total rate (R. 128), and the misclassified fixtures constituted only a minor portion of the total real property. The State Supreme Court ordered such discrimination corrected by reduction of petitioners' special assessments to the level necessary to accord to them the full benefits of the misclassification enjoyed by such other taxpayers. (R. 330.)

In addition to special assessments, petitioner landlords' buildings, unlike those of other landlords, were subject to general taxes based upon an assessed value which included their bank tenants' properly classified

trade fixtures. Comparable but misclassified fixtures in other rented buildings were not included in the building assessments but were assessed as personal property to the tenant. Recovery of general taxes upon the value of the included fixtures was denied petitioner landlords for want of proof that such practice imposed on them a discriminatory tax burden. (R. 324.)

Petitioner bank also claimed damage through increase in a State imposed tax on bank franchises (not imposed or collected by respondents), the rate of which was under statute computed on the basis of the amount of local personal property taxes paid by non-banking corporations. (R. 323.) Relief on this ground was denied petitioner bank, not only because under State statute the State rather than the County should be sued for alleged illegal taxes collected by the State, but also for want of proof that the general misclassification of trade fixtures as personal property had resulted in a discriminatory tax burden. (R. 323-324, 326.)

ARGUMENT

I.

In Each of the Five Actions Brought By Petitioner National Bank, The Decision Involved No Substantial or Important Federal Question With Reference to R. S. 5219 or The Equal Protection Clause and is Based Upon Adequate Independent State Grounds.

The basis of the petition is the theory that petitioners' taxes were erroneous and void. However, these cases do not involve an illegal tax, but involve the question of reducing a legal tax so as to give full effect to the overriding constitutional and Federal statutory requirements of equality and uniformity.

Petitioner bank proceeds from the premise that R. S. 5219 constitutes a conditional grant of power to tax the real property of national banks (Pet., pp. 12-13), and the premise that the equality of treatment enjoined by R. S. 5219 and the Equal Protection Clause requires equal classification rather than equal tax burden (Pet., pp. 12-13), and draws the conclusion that it is entitled to refund of all taxes on the entire building. Since prior decisions of this Court demonstrate the fallacy of both premises of the argument, the asserted Federal question is unsubstantial; and since local assessment practice in Los Angeles County since 1946 has conformed to the statutory statewide practice, the question is also unimportant. Relief having been directed to be awarded to the full amount of the only damages suffered, the decisions below rest upon adequate independent State grounds.

1. No Substantial Federal Question Is Raised.

These cases involve only a local deviation from a long established statewide rule that fixtures are improvements and hence taxable as real property. California Revenue and Taxation Code, secs. 104 and 105, derived from former California Political Code sec. 3617(3), enacted 1872; *San Diego Trust & Sav. Bank v. San Diego,* 16 Cal. 2d 142, 105 Pac. 2d 94 (certiorari denied, 312 U. S. 679); *Trabue Pittman Corp. v. County of Los Angeles,* 29 Cal. 2d 385, 393, 175 Pac. 2d 512, 518. Because of such erroneous local deviation with respect to other property, petitioner bank argues that the County was without power under R. S. 5219 to tax the subject property and that such taxes were wholly void. While the first paragraphs of R. S. 5219 are a grant of power, the power to tax the real property of banks has always existed (*McCulloch v. Maryland,* 4 Wheat. [17 U. S.] 316 at 436), and the third paragraph of R. S. 5219 is carefully worded to preserve rather than grant such power.

This Court has consistently held that errors in value or rate of tax do not destroy the "power" to tax but that such errors go only to the amount of the tax which may be legally collected or retained. The uniformity and equal treatment required by the Equal Protection Clause relate to equality of tax burden. Only to the extent that the tax burden is excessive are the taxes refundable. In *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441 at 446, this Court said:

". . . This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."

In *Central State Bank v. Bennett,* 284 U. S. 239 at 247, this Court said:

". . . The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. . . ."

Hillsborough Township v. Cromwell, 326 U. S. 620, is but an extreme application of the same principle. There the other property escaped taxation altogether and so, in order to bring the subject property down to the same level, it was necessary to reduce the taxes on the subject property to zero.

The above three cases arose under the Equal Protection Clause. The same general rule has been applied to taxes levied under R. S. 5219. *Tradesmen's Natl. Bank v. Okla. Tax Comm.,* 309 U. S. 560; *Iowa Des Moines Nat. Bank v. Bennett,* 284 U. S. 239; *N. Y. ex rel Amoskeag Sav. Bank v. Purdy,* 231 U. S. 373;

Stanley v. Board of Supervisors, 121 U. S. 535; *People's Natl. Bank of Lynchburg v. Marye,* 191 U. S. 272.

In the last cited case the same contention was made as here that the irregularities and illegal method followed rendered the subject tax "void" and beyond the power of the taxing authorities. This Court rejected such contention, saying:

> "We are of opinion, however, that these assessments were not void within the meaning of the rule which absolves the taxpayer from the necessity of paying or tendering the amount equitably due from him. If there were no right to assess the particular thing at all, either because it is exempt from taxation, or because there is no law providing for the same, an assessment under such circumstances would be void, . . . Where, however, there is a statute which provides for an assessment, and gives jurisdiction to the taxing officer, under some circumstances, to make one, but the particular assessment is invalid . . . the equitable duty still rests upon him to pay what would be his fair proportion of the tax as compared with that laid upon other property, . . . This is the equitable rule, and it is good morals as well. . . ." (191 U. S. at 281.)

The above quotation demonstrates that the reason for the rule is not peculiar to any particular paragraph of R. S. 5219 but is the same general rule applied in the first three cases decided under the Equal Protection Clause. Moreover, since the above cases apply the general rule to taxes under the first paragraph of R. S. 5219 which is a grant of power, *a fortiori* the general

rule is applicable to cases under the third paragraph, which merely preserves a power that has always existed.

The foregoing eight cases are in sharp contrast with, and must be distinguished from, certain other cases where the tax in question was wholly unauthorized. *Owensboro Natl. Bank v. Owensboro,* 173 U. S. 664; *First Natl. Bank of Gulfport v. Adams,* 258 U. S. 362.

In the latter situation the tax, being wholly unauthorized and void, cannot be saved by any doctrine of "tax equivalency". In the former situation the subject tax, being authorized, need be reduced only to the extent necessary to remove the discrimination and make the taxes equal those of the most favored taxpayers.

Petitioners cite no cases of this Court to the contrary and we have found none. To support their contention that there is only a limited power to tax under R. S. 5219 and that any irregularity or illegality in the tax makes it utterly void, they cite only *People v. Feitner,* 167 N. Y. 1 at 8, 60 N. E. 265 at 268; *Hamilton National Bank v. District of Columbia,* 176 Fed. 2d 624; *First National Bank of Portland v. Marion County,* 169 Ore. 595, 613 at 616, 130 Pac. 2d 9, 16-17.

None of the cases is in point. The first case merely holds that since a seat on the stock exchange was not taxable at all it could not be taxed to a nonresident under a statute permitting non-residents to be taxed only "to the same extent as if they were residents of

the state." The second case does not decide the amount of refund required. The third case actually decided the very limited question of State law, that real property could not be taxed to a tenant. In the last two paragraphs of the opinion the Oregon court expressly states that it is not passing upon the propriety of assessing fixtures as real property to the landlord (which was the assessment here).

The many cases of this Court are entirely consistent and determine the question in this case. *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441 at 446; *Central State Bank v. Bennett,* 284 U. S. 239 at 247; *Hillsborough Township v. Cromwell,* 326 U. S. 620; *Tradesmen's Natl. Bank v. Okla. Tax Comm.,* 309 U. S. 560; *Iowa-Des Moines Nat. Bank v. Bennett,* 284 U. S. 239; *N. Y. ex rel. Amoskeag Sav. Bank v. Purdy,* 231 U. S. 373; *Stanley v. Board of Supervisors,* 121 U. S. 535; *People's Natl. Bank of Lynchburg v. Marye,* 191 U. S. 272.

2. No Important Question Is Raised.

The tax classification practice herein involved is merely a local problem, which existed in the County of Los Angeles only for the limited period from 1941 through 1946. For several years prior to 1941 petitioner bank actually received a tax advantage many times greater than the tax disadvantage herein complained of, for its vault doors and fixtures were then misclassified as personal property and treated as exempt. (R. 318.) Thereby it received the gratuitious

windfall of total tax escape, whereas other comparable fixtures similarly misclassified were not exempt but were subjected to all general taxes. Subsequent to 1946, the general countywide misclassification practice has been corrected by the County Assessor as declared in a companion case involving the 1947 taxes. *Security-First National Bank v. Board of Supervisors,* 35 Advance California Reports 351; 217 Pac. 2d 948. Petitioners have not sought review of this decision. Thus, petitioner bank has retained its escaped taxes for years prior to 1941; is made whole for the tax years herein involved, 1941-1946; and the question for years subsequent to 1946 has become moot. The questions urged are plainly unimportant.

3. The Decisions Were Based Upon Adequate Independent State Grounds.

The State Supreme Court ruled with, not against, petitioner bank. Discrimination forbidden by R. S. 5219 and the Equal Protection Clause was recognized, and full relief to petitioner was ordered by judgments directing refund to petitioner of the full amount of its damage resulting from special assessments, the amount to be determined in subsequent proceedings. (R. 330.)

Petitioner bank's assertion of damage by alleged increase of the State imposed bank franchise tax was rejected by the California Supreme Court for failure of proof. (R. 323-324, 326.) This was based upon the trial court's express refusal to find damage "because of the lack of sufficient evidence." (Finding XLI, R.

211.) Thus petitioners' assertion that there was rate increase and damage is not supported by the record. This Court has held that the one alleging discrimination has the burden of proving damage. *N. Y. ex rel Amoskeag Sav. Bank v. Purdy,* 231 U. S. 373 at 392-393.

Petitioner's claim of damage under the State imposed bank franchise tax was denied on the further ground that any such damage is recoverable only by action against the State, which imposes and collects the tax. Such remedy and the procedure therefor is provided by the statute itself (Secs. 27 and 30, Bank and Corporation Franchise Tax Act, Stats. 1929, p. 19, 3 Deerings' General Laws, Act 8488) and, in fact, is being pursued by petitioner bank.* Thus, even if there were any damage, completion of this exclusive remedy provided by State law would completely remove it. No Federal question is presented by the mode of relief given by State law so long as an adequate mode is provided. The rule that in considering problems of discrimination all State laws and the acts of all officers are to be considered goes no further than that and does not authorize suing the State for a county obligation or the county for a State obligation.

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*The printed record therefor appears at R. 106 in No. 362, but was inadvertently omitted in this case. In the typewritten Reporter's Transcript it is Vol. 20, pp. 5504-5. It is printed in Appendix B to this Brief.

II.

In Each of the Eighteen Actions Brought by Landlords of National Banks, The Decision Involves No Important Federal Question With Reference to the Equal Protection Clause, But Was Decided Upon Adequate Independent State Grounds.

Petitioner landlords have no standing to assert protection of paragraph 3 of R. S. 5219, because such rights are not personal to these claimants. *Henderson & Calloway v. Tennessee,* 10 How. [51 U. S.] 311; *Long & Watson v. Converse,* 91 U. S. 105; *Missouri v. Andreano,* 138 U. S. 496; *Tyler v. Judges of Court of Registration,* 179 U. S. 405; *Albright v. New Mexico,* 200 U. S. 9. Their claim is limited to the Equal Protection Clause.

The claimed denial of equal protection is based upon the conceded fact that the landlords of the subject properties paid taxes on valuations which were enhanced by fixtures, whereas other landlords paid taxes on building valuations not so enhanced. With respect to the differential in amount of tax (i.e., the special assessment levies) this has been ordered corrected by the court below and no new question is presented here different from that discussed in the last point. With respect to the difference in assessee (i.e., landlord or tenant) recovery was denied by the State court because of no proof of damage.

1. No Important Federal Question Is Raised.

The problem of who is the proper assessee involves no question of tax escape. As the California Supreme Court correctly observed, "the complaint is not concerned with the comparative tax on the various properties, but solely with the question of whether the taxes will be paid by the landlord or his tenant." (R. 324.)

The State practice in this regard has been changed and is now controlled by Section 2188.2 of the California Revenue and Taxation Code (Stats. 1947, ch. 782), reading:

> "Whenever improvements are owned by a person other than the owner of the land on which they are located, the owner of the improvements or the owner of the land may file with the assessor a written statement before the lien date attesting to their separate ownership, in which event the land and improvements shall not be assessed to the same assessee."

By the statutory procedure thus afforded this problem is avoided in the future. A decision on the point favorable to petitioners thus would not be of general interest or importance.

2. The Decisions Were Based Upon Adequate, Independent State Grounds.

Denial of recovery of general taxes in each of the eighteen cases under discussion was predicated upon the absence of any showing of damage. (R. 324.) This Court has held that the one alleging discrimina-

tion has the burden of proving damage. *N. Y. ex rel Amoskeag Sav. Bank v. Purdy,* 231 U. S. 373 at 392-393.

The statement in the opinion below (R. 324), that petitioner landlords may have protected themselves by contract against increased taxes due to their tenants' fixtures, is factually supported by the record. In accordance with usual ad valorem tax practice *(United States v. County of Allegheny,* 322 U. S. 174, 184), such taxes do not constitute a personal obligation, but by State law are *in rem* and impose a lien on the taxed property. California Revenue and Taxation Code, Sec. 2188. Thus, it is significant that the leases contained either a covenant by the tenant to reimburse the landlord for increased taxes or a covenant to keep the premises free and clear of liens or encumbrances created by acts or omissions of the tenant. (R. 65, 83.) Not only have petitioners failed to sustain their burden of proving damage, but the logical inference from the found facts is that there was no damage.

In contending that the possibility of contractual escape from the tax burden is not a sufficient State ground of decision, petitioners unavailingly rely on *United States v. County of Allegheny,* 322 U. S. 174. That decision correctly held that a tax on federally owned machinery, which was wholly exempt, could not be justified on the theory that its incidence was on a bailee of the machinery.

The subject property herein, of course, was fully and legally taxable at all times. Even had national

bank fixtures been misclassified like other fixtures, such fixtures would not thereby have become "exempt", in the sense of lack of power to tax, but would merely have been accorded an "unwarranted exemption" (R. 322) in the sense of a gratuitous escape from taxes to which they were legally subject. To shift the burden of such authorized taxes by contract is not to evade a legal immunity, as in the Allegheny County case.

III.

In Each of the Twenty-Three Cases The Federal Question With Reference to the Due Process Clause Was Not Timely Raised, and the Decision Was Based Upon Adequate Independent State Grounds.

Petitioners concede (Pet., pp. 13, 19) that State law reserves to the taxing entities power to reassess and collect again the legally valid portion of any taxes refunded by order of court. (California Revenue and Taxation Code, Secs. 4946-4948.) They complain, nevertheless, that application to them of a state rule of procedure permitting retention of the valid portion of the paid taxes in the initial refunding proceedings violates the requirements of Due Process. And they complain further that such rule is a "policy" rule declared for the first time in the decision sought to be reviewed. Both complaints are without merit. The California rule is based upon equitable principles repeatedly approved by this Court and is a rule of long standing in California. It should have been anticipated by peti-

tioners, and consequently the contention that it violated Due Process was not timely raised on petition for rehearing.

1. The Decisions Were Based Upon Adequate Independent State Grounds.

A long line of California decisions and the applicable State statute require application to petitioners of the equitable principle withholding refund of the valid portion of the tax. In California tax refunds are governed by equitable principles. *Universal Consolidated Oil Co. v. Byram,* 25 Cal. 2d 353, 153 Pac. 2d 746; *Otis v. Los Angeles,* 9 Cal. 2d 366, 70 Pac. 2d 633; *Third & Broadway Bldg. Co., v. Los Angeles,* 220 Cal. 660, 32 Pac. 2d 377; *First Trust & Sav. Bank of Pasadena v. Los Angeles,* 206 Cal. 240, 273 Pac. 1066; *Steele v. San Luis Obispo County,* 152 Cal. 785, 93 Pac. 1020; *Mackay v. San Francisco,* 113 Cal. 392, 45 Pac. 696; *Esterbrook v. O'Brien,* 98 Cal. 671, 33 Pac. 765; *De-Fremery v. Austin,* 53 Cal. 380; *Bank of Mendocino v. Chalfant,* 51 Cal. 369.

Thus taxes paid upon assessments which are irregular or invalid will not be refunded if the property is in fact taxable and the whole amount is equitably due. *First Trust & Sav. Bank of Pasadena v. Los Angeles,* 206 Cal. 240, 273 Pac. 1066.

Where part only is invalid there may be division and refund of the invalid portion only, whether the invalidity relates to part of an assessment (*Third & Broadway Bldg. Co. v. Los Angeles,* 220 Cal. 660, 32

Pac. 2d 377; *Mackay v. San Francisco,* 113 Cal. 392, 45 Pac. 696) or part of a tax. *Otis v. Los Angeles,* 9 Cal. 2d 366, 70 Pac. 2d 633; *DeFremery v. Austin,* 53 Cal. 380. Also, it is established in California that the taxes and special assessments of different entities are entirely separate and distinct. *Loew's, Inc. v. Byram,* 11 Cal. 2d 746, 82 Pac. 2d 1.

Corrections which cannot be made by the courts may be made by the Board of Equalization (*Universal Consolidated Oil Co. v. Byram,* 25 Cal. 2d 353, 153 Pac. 2d 746) acting as a quasi judicial body, exercising judicial functions. *McClelland v. Board of Supervisors,* 30 Cal. 2d 124 at 129, 180 Pac. 2d 676; *Los Angeles Gas & Electric Co. v. Los Angeles,* 162 Cal. 164 at 169, 121 Pac 384.

Section 5141, California Revenue and Taxation Code, is legislative recognition of the equitable principle established by this long line of decisions.* It recognizes that part of a tax or part of an assessment may be void and the rest valid. It provides for a refund of the invalid portion only and for interest thereon. This long established State procedure followed by the court below made it unnecessary for the Court to discuss State laws relative to reassessment.

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*Section 5141, California Revenue and Taxation Code:

"If the court finds that the assessment complained of is void in whole or in part, it shall render judgment for the plaintiff for the amount of the taxes paid on so much of the assessment as is found to be void. In such event but only where taxes are paid after the effective date of this act, the plaintiff is entitled to interest on the taxes for which recovery is allowed at the rate of 5 per centum per annum from the date of payment under protest to the date of entry of judgment, and such accrued interest shall be included in the judgment. The taxes paid on so much of the assessment as is not found to be void shall constitute valid taxes which, if paid after delinquency, shall carry penalties, interest and costs."

Such California rule is in complete harmony with the decisions of this Court which have repeatedly approved the equitable rule requiring payment or tender of valid taxes as a condition precedent to attacking an invalid portion. *People's Natl. Bank of Lynchburg v. Marye,* 191 U. S. 272; *Albuquerque Nat. Bank v. Perea,* 147 U. S. 87; *Stanley v. Board of Supervisors,* 121 U. S. 535; *German Nat. Bank of Chicago v. Kimball,* 103 U. S. 732; *State Railroad Tax Cases,* 92 U. S. 575. The California rule that corrections which cannot be made by a court may be made by a board of equalization (*Universal Consolidated Oil Co. v. Byram,* 25 Cal. 2d 353, 153 Pac. 2d 746) is consistent with the different functions of such bodies, recognized by this Court in *Stanley v. Board of Supervisors,* 121 U. S. 535 at 549-550. Because of such rule, not presented in *Santa Clara County v. Southern Pac. R. Co.,* 118 U. S. 394, and *California v. Central R. R. Co.,* 127 U. S 1 (cases relied upon by petitioner) the latter cases are not here in point. Furthermore, neither case lays down any Federal rule prohibiting segregation of valid and invalid taxes if permitted by State law, and both cases recognize that where segregation can be made, segregation should be made.

2. The Question Was Not Timely Raised.

Deprivation of Due Process was admittedly urged for the first time on petition for rehearing. In view of the foregoing statute and decisions the conclusion reached by the State Supreme Court could reasonably have been anticipated and should have been antici-

pated. Hence, this is in no sense a "surprise" case within the rule of *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U. S. 673, 677-678, but is governed by *Herndon v. Georgia,* 295 U. S. 441, 443-444, and *American Surety Co. v. Baldwin,* 287 U. S. 156, 162.

CONCLUSION

WHEREFORE, it is submitted that the writ of certiorari prayed for should be denied.

Respectfully submitted,

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